ORIGINAL

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RESPONSE REQUESTED

89-1167

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

ROBERT L. BRUTSCHE, M.D., Petitioner

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

PETITION TO PROCEED IN FORMA PAUPERIS

Now comes Respondent, Linda Cleveland-Perdue, by her undersigned counsel and respectfully requests, based upon the attached affidavit of counsel, leave to proceed in forma pauperis.

Michael E. Deutsch

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State of Illinois)
) SS:
County of Cook)

AFFIDAVIT

Michael E. Deutsch, being first duly sworn and under penalty of perjury states the following:

1) I am one of the attorneys for the Estate of Joseph Jones Jr. who died in 1975 while a prisoner at Terre Haute Prison.

2) The only asset of the estate is the prospective recovery from the civil rights action which is the subject of this appeal.

3) This case has been in litigation for over 13 years having been heard by this Court in 1980, Green v. Carlson, 446 U.S. 14 (1980) and on three occasions by the United States Court of Appeals for the Seventh Circuit. The estate was granted permission by this Court to proceed in forma pauperis on the prior occasion in 1980.

4. The estate has no monies for which to pay to prosecute this case and therefore it is requested that the estate and administratrix Linda Cleveland-Perdue be granted permission to proceed in forma pauperis.

Michael E Deutsch
A F F I A N T

Signed and sworn to
before me this 28th
day of March, 1990.

NOTARY PUBLIC

OFFICIAL SEAL
JOSE L. BERRIOS
NOTARY PUBLIC STATE OF ILLINOIS
MY COMMISSION EXP. AUG 3,1992

IN THE SUPREME COURT
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ROBERT L. BRUTSCHE, M.D., Petitioner

v.

LINDA CLEVELAND-PERDUE, Successor Representative and Administratrix of the Estate of Joseph Jones, Jr. (a/k/a Roscoe Simmons), Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1) Did the District Court apply a standard different than "clearly established" in denying Petitioner qualified immunity?

2) Did the authoritative, consistent prior opinions of three Court of Appeals in four separate decisions as to the Eighth Amendment liability for systemic denial of medical care satisfy the "clearly established" standard?

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STATEMENT OF THE CASE

1) Procedural History

On June 18, 1976, Marie Green, the mother of decedent Joseph Jones* and administratrix of his estate,** filed a Bivens action in the Southern District of Indiana seeking damages against Bureau of Prisons Director Norman Carlson, Bureau of Prisons Medical Director Dr. Robert Brutsche, and Terre Haute Prison doctor Benjamin DeGracias*** under the Fifth and Eighth Amendments for their deliberate indifference to her son's serious medical needs, which caused his death in August of 1975.

In January of 1977, the District Court dismissed Plaintiff's complaint, holding that Indiana wrongful death law applied, thereby limiting decedent's damages to burial expenses and precluding satisfaction of the $10,000.00 jurisdictional amount. The Seventh Circuit reversed, establishing a federal common-law right of survivorship. Carlson v. Green, 581 F.2d 669 (7th Cir. 1978). The Defendants then appealed this ruling to the Supreme Court, raising for the first time the argument that the Federal Tort Claims Act pre-empted the field and barred a Bivens action for Plaintiff's injuries. This Court, after expressly adopting the holdings of the lower courts that Plaintiff's complaint sufficiently alleged a deliberate indifference claim, found a right to bring this claim directly under the Eighth Amendment, and affirmed the Seventh Circuit's recognition of the federal common-law right of survivorship. Carlson v. Green, 446 U.S. 14 (1980).

The matter was remanded to the District Court for discovery and trial, and the United States Attorney for the Southern

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*While Plaintiff-decedent's given name is Joseph Jones, he was known within the Bureau of Prisons system as Roscoe Simmons.

**After waiting 12 years to have her day in Court, Ms. Green died in the summer of 1988. The mother of two of Joseph Jones' children, Linda Cleveland Perdue, has replaced Ms. Green as the administratrix.

***Plaintiff also sued other prison employees and the Joint Commission on Hospital Accredidation who are no longer parties in this case.

District of Indiana was replaced by three separate privately retained and publicly renumerated law firms, who proceeded to initiate an extensive process of discovery. After the vast majority of discovery was completed, the Defendants filed a voluminous motion, brief and appendix for summary judgment and qualiified immunity. On October 19, 1984, the District Court denied Defendants' motion in total.

The District Court then ordered the case to proceed to trial on October 31, 1984. After first filing a notice of appeal as to the District Court's qualified immunity ruling, Defendants Carlson, Brutsche and DeGracias then entered into a settlement with Plaintiff, agreeing to pay decedent's estate $150,000 on the condition precedent that their principals -- the Justice Department -- implement a regulation providing for indemnification of federal employees acting within the course of their employment. As part of this agreement, Defendants withdrew their appeal of the qualified immunity ruling and Plaintiff agreed to continue the trial for a one year period to allow for the implementationn of the indemnity regulation.

When the Justice Department failed to implement the anticipated regulation, the matter was reset for trial in March of 1986. On the eve of this second trial date, Defendants filed a second motion for summary judgment and qualified immunity, which was almost identical to the first motion and which incorporated no significant factual matter which was not already raised in Defendant's first motion. On June 2, 1986 the District Court again denied Defendants' request for qualified immunity.

The Defendants, utilizing the Cohen-Mitchell* collateral order doctrine, brought an interlocutory appeal from this second denial of qualified immunity, and on appeal the Seventh Circuit determined that the case should be remanded to the District Court for the enumeration of more specific factual findings, disputed and undisputed, which formed the basis for

*Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and Mitchell v. Forsyth, 472 U.S. 511 (1985).

the denial of qualified immunity. Green v. Carlson, 826 F.2d 647 (7th Cir. 1987).

On July 5, 1988, the District Court entered a 29 page order enumerating the specific disputed and non-disputed facts upon which the Court based its qualified immunity determination. In its ruling, the Court held that Defendant Norman Carlson was entitled to qualified immunity, but, for the third time, determined that Defendants Drs. Robert Brutsche and Benjamin DeGracias were not so entitled. Defendant Brutsche then brought another pretrial qualified immunity appeal,* and the Seventh Circuit, applying the District Court's findings, upheld the determination that Defendant Brutsche's conduct violated a clearly established right under the Eighth Amendment to be free from deliberate indifference to serious medical needs. Cleveland-Perdue v. Brutsche, 881 F.2d 427 (7th Cir. 1989).

2) STATEMENT OF FACTS**

On August 14, 1975 Plaintiff-decedent Joseph Jones, Jr. suffered a serious asthma attack while confined in the infirmary at Terre Haute prison. His condition worsened over the next six hours and the Physician's Assistant (PA) on duty, William Walter, made repeated requests to the prison doctor, Defendant Benjamin DeGracias, to return to the institution from his home five minutes away or to order the patient transferred to an outside hospital emergency room. DeGracias refused to follow either course. (App. B-9-10, App. A-3) Instead, after Plaintiff-decedent became progressively more agitated from his inability to obtain oxygen, DeGracias ordered over the telephone, without examining the patient, the injection of 200 m.g.

*Defendant Dr. DeGracias did not appeal this ruling from the District Court.

**The facts enumerated in this Statement are based in substantial part on the findings of the District Court in its second denial of summary judgment and qualified immunity for Petitioner Brutsche [found in Appendix B to Brutsche's Petition for Certiorari (App. B)] and the second immunity opinion of the Court of Appeals for the Seventh Circuit [found at 881 F.2d 427 and in Appendix A to Brutsche's Petition (App. A)]. The additional facts cited in this Statement are contained in the record of the case, including depositions and affidavits. All citations to the Appendix are to Petitioner's Appendix.

of Thorazine, a powerful depressant drug, directly contra-indicated for someone in Joseph Jones' condition. Almost immediately thereafter, Jones suffered respiratory arrest and only after PA Walter so informed Dr. DeGracias and again urged him to return to the prison, did he come, ten to fifteen minutes later. (App. B-9-10, App. A-3) By then it was too late, and Joseph Jones could not be revived.

Beginning eight months earlier with the death of prisoner William Lowe on January 6, 1975, specific and serious inadequacies with the delivery of emergency medical care at Terre Haute prison were brought to the attention of Defendant-Petitioner Dr. Robert Brutsche, who was the Medical Director of the Bureau of Prisons.

At the time of Lowe's death, the only full-time doctor at the prison* was Dr. Silverman, hired by Defendant Brutsche at the age of 72. Prior to Lowe's death, Brutsche knew Silverman had become enfeebled. (App. B-3, App. A-3)

On January 4, 1975, Lowe had been admitted to the prison infirmary and diagnosed by a Physician's Assistant as having pneumonia. (App. B-3) That same day, Silverman prescribed Demerol over the telephone without examining patient Lowe. When the Physician's Assistant suggested that such a drug was inappropriate, Silverman agreed and rescinded his order. (App. B-3, A-4) On the 6th, however, when Lowe's condition worsened, Silverman was again called on the telephone and the Physician's Assistant recommended that Lowe be moved to the local hospital. Silverman initially agreed, but before Lowe could be moved, Silverman called back and ordered Lowe be kept at the penitentiary, and that Lowe be administered Demerol. The Demerol was administered at approximately 6:05 a.m., and Lowe stopped breathing at 6:15 a.m. (App. B-3, A-2)

In light of the highly irregular circumstances of Lowe's death, as well as a prison-wide work stoppage protesting the inadequate medical care at Terre Haute, Defendant Brutsche was

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*Previously there had been two full time doctors.

immediately dispatched to the prison to conduct an investigation. (App. B-4)

During his investigation into Lowe's death, Defendant Brutsche did not interview any prisoners, despite the fact that they had made numerous complaints about medical care and several had specific information about Lowe's death. (App. B4) Nor is there any clear evidence that he talked to Physician's Assistant Snowden who was present during the last few hours prior to Lowe's death (App. B-4)

The medical facility at Terre Haute was not adequately staffed or equipped. Much of the work in the infirmary was performed by inmate nurses who were not trained in either the basics of nursing care or rudimentary principles of sanitation. (Affidavit of Physician Assistant William Walter) The prison infirmary had a laboratory, staffed by an inmate, capable of performing only the most rudimentary procedures.* The prison infirmary did not have access to any written protocols or guidelines regarding the treatment of seriously ill patients, including asthmatics. (Affidavit of William Walter)

After Lowe's death, Defendant Brutsche did recommend that Silverman, who he learned was suffering from "cerebral arteriosclerosis" and was taking valium for depression, (App. B-4, A-2) be asked to resign; however, he intentionally prepared no written report of the systemic breakdown suggested by Lowe's death (App. B-5)

Although Brutsche recognized the structural problems in the delivery of emergency medical care raised by the death of William Lowe, Brutsche instituted no substantive changes in hospital procedures, staffing, or training after Lowe's death. (App. B-5)

Likewise, he made no changes in the procedures or criteria for doctors to respond to emergency calls, for the emergency

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*Most specifically, it had no equipment for measuring blood gases, which was an important test where patients were suffering from respiratory disorders, as were Lowe, McCain and plaintiff-decedent.

transfer of prisoners to an outside hospital, or for administering drugs over the telephone. Nor did Brutsche, despite the obvious incompetency of Dr. Silverman, establish criteria and procedures for evaluating a staff physician's performance. (App. B-8)

The only two written recommendations made by Defendant Brutsche after his investigation of Lowe's death concerned more careful recordkeeping, i.e. proper recording of progress notes on in-patients and a kardex system to keep information on patients. (App. B-5, A-3) Moreover, Brutsche took no steps to see that these minimal recommendations were implemented (App. B-5, A-3) and the record keeping recommendations had not been instituted at the time of Plaintiff-decedent's death.

For seven months after Silverman's resignation, the prison was left without a full-time doctor; Dr. Brutsche knew and approved of this. (App. B-12) Specific complaints and official inquiries concerning the delivery of medical care at Terre Haute continued to be made, and were brought to the attention of Dr. Brutsche and BOP Director Carlson. Carlson's office, with Brutsche's acquiescence, replied to these complaints and inquiries, including those by members of Congress, by saying that all the problems at Terre Haute prison infirmary had been resolved by Brutsche's investigation, and that a full time physician was on staff on Terre Haute. Neither of these representations were, to say the least, accurate. (App. B-5)

Brutsche was also made aware of the emergency medical care inadequacies at the Terre Haute infirmary by the recommendations of the Joint Commission on Accreditation of Hospitals. The Joint Commission awarded the Terre Haute prison hospital a limited one year accreditation in November, 1974, because it found that the hospital needed to improve the administration and delivery of emergency medical care. (App. B-5-6)

Further, Defendant Brutsche was informed of two deaths of prisoners at Terre Haute after the death of Lowe: Frederick McCain on April 10, 1975 and Robert Graham June 8, 1975.

Despite the serious medical condition of both these prisoners, neither was provided access to a doctor at the prison prior to their death. Without visiting the institution after either death, Brutsche nonetheless concluded that adequate medical care was provided to both men. (App. A-3, B-7-8) Brutsche failed to prepare a written report of these deaths nor were any steps taken to insure that seriously ill patients were promptly seen by a physician. (App. B-7-8)

In August of 1975, Brutsche hired Defendant Benjamin DeGracias as the full-time staff physician for Terre Haute. Prior to his hiring of DeGracias, Defendant Brutsche had not instituted any written procedures for hiring or evaluating new doctors. (App. B-8)

Dr. DeGracias reported for work on August 3, 1975. At the time he was hired, DeGracias received no orientation from Brutsche or his office, nor was he provided with any materials which explained his obligation to be available during off-duty hours or the relative responsibilities between himself and the Physician's Assistants. (App. B-11) In fact, Defendant Brutsche did not explain in detail the relationship between the Physician's Assistant and physician to Defendant DeGracias until eight days after Jones' death.

Despite the failure to use the outside emergency medical services in the death of William Lowe, Brutsche also had failed to establish any written procedures for referring a prisoner to an outside hospital. Consequently, DeGracias was not informed of any written guidelines concerning the availability and use of such outside medical facilities. (App. B-11). Since Brutsche had failed to write evaluative reports concerning the deaths of Lowe, Graham and McCain, there was no documentation to be made available to DeGracias concerning the previously identified problem areas in the delivery of emergency medical care. DeGracias was neither cautioned about nor directed to desist from ordering over the telephone the administration of drugs without examining the patient. (Deposition of DeGracias)

Since the staffing problems had not been addressed after Lowe's death, Physician's Assistant Walter was the only medical staff person on duty throughout the entire night shift. Besides attending to Joseph Jones who was suffering from a serious asthma attack, he had to perform other duties, including dispensing of medication to the other patients in the infirmary. In addition, Walter had no formalized training, was given no special courses on emergency medical care, nor was he even trained to recognize patients who suffered from lack of oxygen or to differentiate them from those who were merely agitated. (Affidavit of William Walter)

After Joseph Jones' death, Brutsche finally issued a list of recommendations to the Warden, including the keeping of full in-patient medical records on anyone admitted to the prison hospital; the more liberal utilization of outside hospital facilities; the taking of steps to encourage better communication among the staff; the review of all "problem" cases; and the establishment of a policy concerning the availability of physicians during off-duty hours. (App. A-23, A-31)

As stated in the expert opinion of Dr. Robert Cohen, then the administrator of Health Services for the New York Department of Corrections, the circumstances surrounding the death of William Lowe, coupled with the subsequent death of Francis McCain and Robert Graham,

> ...established the presence of critical failures and deficiences in the structure and functioning of the health care delivery system which were obvious, potentially life threatening, and which were not remedied prior to the death of decedent Joseph Jones...
>
> (Affidavit of Dr. Robert Cohen)

Based upon these facts, the Appeals Court below found that the district court had determined, with regard to Brutsche, that there were several disputed issues that precluded the entry of summary judgment in his favor on the issue of qualified immunity, including:

> (1) whether the physician's assistants were adequately trained; (2) whether DeGracias had received any instruction about transporting seriously ill

prisoners to area hospitals; (3) whether Brutsche had conducted a thorough investigation after the first death at the prison hospital; (4) whether the fact that the record-keeping recommendations were not implemented prior to Jones' death reflected on Brutsche's liability and (5) whether Brutsche should have implemented a policy concerning the need for physicians to come to the hospital to examine prisoners facing life-threatening conditions in the wake of Lowe's death.

(App. A-4)

REASONS FOR DENYING THE WRIT

1) The opinion of the Seventh Circuit does not conflict with the "clearly established" qualified immunity standard created by this Court, does not conflict with a ruling of any other Court of Appeals, nor does it create a new qualified immunity standard. Moreover, the opinion does not create a confusing test for granting qualified immunity to public officials nor would review by this Court further clarify the law of qualified immunity.

2) The Seventh Circuit's decision that Dr. Brutsche's conduct violated clearly established law was a correct determination; additionally, it is a fact specific ruling, of which review by this Court would be of little value to other public officials.

I.

The Court of Appeals below, relying on the extensive findings of the District Court, engaged in a detailed analysis of the issue of qualified immunity as it applied to the specific facts of this case and the particular defendant who raised it. The District Court had rejected this claim of immunity on the basis of the Seventh Circuit decision in Thomas v. Pate, 493 F.2d 151 (7th Cir. 1975); see also Joseph v. Brierton, 739 F.2d 1244 (7th Cir. 1984), which, prior to plaintiff's death, clearly established the right of a prisoner to be free from deliberate indifference to serious medical needs. The Court of Appeals below, however, applied this Court's holding in Anderson v. Creighton, 483 U.S. 635 (1987), and made a more specific and expanded inquiry than that made by the District Court to determine whether the right was clearly established in light of

Defendant Brutsche's particular conduct. In so doing, it examined relevant case law to determine whether the right to be free from systemic deliberate indifference in the delivery of medical care, as alleged and demonstrated by the plaintiff here against Brutsche, was clearly established.

Determining that there was no Supreme Court or Seventh Circuit decision which controlled the question, it turned to decisions by other Courts of Appeals in order to determine whether the particularized legal right in question was clearly established.

This method of determining whether the relevant law was "clearly established" is entirely consistent with the language and practice of this Court, as well as several Courts of Appeals, in making such immunity determinations. In Procunier v. Navarette, 434 U.S. 555 (1977), this Court, for the first time used "clearly established" terminology in defining the objective qualified immunity standard. In so doing, it acknowledged that this determination could be made with "reference to the opinions of this Court, of the Courts of Appeals or the local District Court," 434 U.S. 565, and examined the issue raised by the defendant in light of previous decisions by the local District Court and various Courts of Appeals, and a subsequent decision by this Court. 434 U.S. at 563-4. In Harlow v. Fitzgerald, 457 U.S. 800, 818, 818, note 12 (1982), this Court, quoting Procunier, refused to go further into how the "state of law" was to be "'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or the local district court'", but instead left that up to the lower court's discretion. Subsequently, in Mitchell v. Forsyth, the Court again turned, inter alia, to several conflicting District Court decisions to determine that the right in question was not clearly established. cf. Davis v. Scherer, 468 U.S. 183 (1984).*

*In Davis , this Court determined that statute and regulation could also clearly establish the right if, and only if, the statute provided the basis for the cause of action sued upon.

In conformance with Procunier, Harlow, Mitchell, and Anderson, several Courts of Appeals have determined that, in the absence of controlling decisions by this Court or by the Court of Appeals in the jurisdiction where the alleged violation took place, a Court should look to whatever desisional law is available to ascertain whether the law is clearly established under Harlow. Rakovich v. Wade, 850 F.2d 1180, 1209 (7th Cir. 1988); Capoeman v. Reid, 754 F.2d 1512, 1514 (9th Cir. 1985) (reviews decisions in "another circuit, various district courts and state courts"); Ricci v. Bankshares of Maine, Inc., 768 F.2d 456 (1st Cir. 1985) (examines other Circuit Courts of Appeals to determine "nationwide precedent" in the absence of a controlling First Circuit decision); Bilbery by Bilbery v. Brown, 738 F.2d 1462, 1466 (9th Cir. 1984).

The Court of Appeals below therefore correctly followed the clear teachings and practice of this Court and several Courts of Appeals when it looked to decisions by other Courts of Appeals to determine that, at the time of plaintiff's death, "a clear consensus had been reached indicating that a prison official's failure to remedy systemic deficiencies in the medical services akin to those alleged in the present case constituted deliberate indifference to an inmate's medical needs." (App. A-7)

The alternative language in the Seventh Circuit opinion, "whether there was a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time", (App. A7) simply further defines the "clear consensus" language, and does not create a different test than "clearly established." This language merely states the recognized and logical principle, that even in the absence of a binding precedent in the Supreme Court or the specific Court of Appeals in which the case arises, authoritative and consistent decisions determining the same legal rights by coordinate Courts of Appeals, also create clearly established law. This principle,which allows for a

determination of "clearly established" by reference to consistent decisions by other Courts of Appeals, does not create a new standard, nor does it allow for uncertainty or inhibit public officials from carrying out their official responsibilities. Furthermore, contrary to the Petitioner's claim, the Court of Appeals decision below does not require a defendant to predict future development in the law, but rather only to follow what the uncontradicted federal Constitutional law was at the time.

Moreover, the decision of the Court of Appeals for the D.C. Circuit in Zwiebon v. Mitchell, 720 F.2d 162 (D.C. 1983) cert. denied, 469 U.S. 880 (1984), (Zwiebon IV) is not in conflict with the decision here.

In an earlier Zwiebon decision, the D.C. Circuit had held its determination that the defendant's conduct was unconstitutional was retroactive because it was "clearly foreshadowed" by prior decisions. [See Zwiebon III, 606 F.2d 1172 (D.C. Cir. 1979), applying retroactively the decision in Zwiebon I, 516 F.2d 594 (D.C. Cir. 1975).] In making its clearly foreshadowed determination, the D.C. Circuit relied upon two prior decisions from other district courts which found similar coniduct to be unconstitutional. In Zwiebon IV, the plaintiff attempted to invoke the prior retroactivity determination to defeat the defendant's qualified immunity claim, arguing that "clearly foreshadowed" was coterminous with "clearly established". The D.C. Circuit rejected this argument, noting that at least five other prior district court decisions contradicted the two which had condemned similar conduct as unconstitutional:

> Contradictory lower court rulings might not establish that a decision was not clearly foreshadowed and should not have retroactive effect, but such a split of decisions might provide reasonable grounds for taking actions based on one or the other position for official immunity purposes.

Zwiebon IV, 720 F.2d at 173, citing Zwiebon III, 606 F.2d at

1181 nt.49.*

Therefore, in this case the use of "clear consensus" and "clear trend" language in no way equates with the application of the less stringent "clearly foreshadowed" test. Here, the Seventh Circuit relied on four Court of Appeals decisions, which were uncontradicted by any other decisions,** and which were subsequently adopted in several additional Circuits, including the Seventh Circuit itself, while in Zwiebon the contradictory district court decisions precluded a finding of clear consensus (i.e.: clearly established), while supporting a determination of clearly foreshadowed.

II.

The law was clearly established by the authoritative decisions of three Courts of Appeals in four separate decisions*** that systemic deficiences in the delivery of medical care constitute violations of the Eighth Amendment. Thus, the question of whether the conduct of Petitioner Brutsche in

*Other Courts of Appeals have also distinguished by definition these obviously different standards. See, e.g., U.S. v. Blake, 632 F.2d 731 (9th Cir. 1980), where the Ninth Circuit found the clearly foreshadowed test to be satisfied where the courts had persistently avoided the question sought to be applied retroactively or there was "some drift" towards establishing the issue in question. See also Acoff v. Ashton, 762 F.2d 1543 (11th Cir. 1985).

**Reliance on the definitive rulings of other Courts of Appeals is particularly appropriate in this case where the public official who seeks immunity administered a nationwide medical system with institutions under the jurisdiction of the particular Courts of Appeals from which the definitive rulings emanate. It would certainly be an anomalous and patently unfair if a public official in Dr. Brutsche's position were able to cloak himself with immunity because the decedent died in a prison governed by a Court of Appeals which had not yet decided a case concerning the systemic denial of emergency medical care, rather than in another Federal Prison, such as those located in Springfield, Missouri, Atlanta, Georgia, or Danbury, Connecticut, where the controlling Court of Appeals had established that the conduct in question violated the Eighth Amendment.

***See Newman v. Alabama, 503 F.2d 1320 (5th Cir. 1974) cert. denied, 421 U.S. 948 (1975); Finney v. Arkansas Board of Corrections, 505 F.2d 194 (8th Cir. 1974); Stoneman v. Bishop, 508 F.2d 1224 (2d Cir. 1974) cert denied, 421 U.S. 948 (1975); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). As noted in several of those cases, this law was further clearly established by the underlying District Court decisions, and by previous decisions by various Courts of Appeals, including the Seventh Circuit, in cases where individual prisoners brought claims based on isolated instances of deliberate indifference to a particular inmate's serious medical needs.

failing to remedy the deficiencies in the delivery of emergency medical care at Terre Haute was sufficiently analogous to the conduct of the supervisory prison employees in those landmark Appeals Court cases, is a fact specific question which will have no significance beyond this particular case. Nonetheless, the Petitioner argues in Part II of his petition that this Court should grant his petition because "the case law did not put him on notice that his conduct was unlawful", particularly since he was a "distant administrator who had no responsibility for providing direct medical care." (Pet. p.13)

The authoritative principles set out in Finney v. Arkansas Board of Corrections, Bishop v. Stoneman, Gates v. Collier and Newman v. Alabama, and the fact patterns in those cases which were held to constitute Eighth Amendment violations, would indeed have put Dr. Brutsche on notice that his failure to take reasonable steps to remedy the gross inadequacies in the delivery of medical care at Terre Haute, constituted unconstitutional deliberate indifference. As recognized by the Court of Appeals below, systemic medical care deficiencies which denied inmates prompt, efficient examination, treatment or medication, which allowed for grossly inadequate staffing, training, and the absence of on site doctors, and which provided grossly inadequate emergency services, including transfer to outside hopsitals, were condemned as violations of the Eighth Amendment, Newman and Finney, while repeated failures to provide adequate care were condemned in Bishop. (App. A-7-8; see also Gates v. Collier.)

As further recognized by the Court below, these cases also informed a "reasonable person in Brutsche's position" of his obligation to take substantial steps to remedy these specific problems in order to cure the patent constitutional infirmities. (App. A-9) Nonetheless, Brutsche failed to take any substantive steps to first document and then address the obvious systemic problems with the delivery of emergency medical care at Terre Haute. He wrote no evaluative reports; he failed

to clarify the responsibility of the staff physician to report to the institution or to transfer a prisoner to an outside hospital; he failed to create a process for evaluating a doctor's performance or to establish procedures and criteria for hiring and orientating new doctors; and he failed to address the understaffing and training problems of prison medical employees. Such a complete failure to remedy these systemic deficiencies, despite notice, places his conduct well within the deliberate indifference standard established in Newman, Finney, Gates, and Bishop.

Nor can Brutsche's claim that he is without responsibility because he was a "distant supervisor" be credited. It was Brutsche who was empowered to conduct an investigation at Terre Haute following the death of William Lowe. It was Brutsche who chose not to write a report and to make only minimal cosmetic changes after Lowe's death, and it was Brutsche's alleged conclusion that everything was proper at Terre Haute that was cited in response to numerous continuing complaints about the medical care at Terre Haute. Further, it was Brutsche who, after the death of Joseph Jones, finally recommended some of the systemic changes which he had known were necessary at least since the death of prisoner Lowe some eight months earlier. While he may not have been in charge of "day to day" medical care at Terre Haute prison, as the chief medical officer he was certainly ultimately responsible for remedying systemic medical deficiencies, particularly when they were so extreme that he was put on notice of them in great particularity, and held himself out as responsible to remedy the problems.*

Focusing on the deprivation of care to plaintiff-decedent,

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*The Petitioner also argues that his purported status as a "high" government official should afford him greater protection than those with "less complex discretionary responsibilities" (Pet. at 18). This Court rejected this proposition in Anderson v. Creighton, stating that "we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties." 413 U.S. at 643. See also Kurowski v. Krajowski, 848 F.2d 764 (7th Cir. 1988).

the Petitioner also argues that plaintiff's evidence only raises "what level of medical care was unconstitutionally mandated" rather than the effective denial of medical care, (Pet. p.15), and cites one Court of Appeals and several District Court decisions which purportedly hold that such a "right" was not clearly established in August of 1975. This interpretation of the evidence impermissibly takes the facts in the light most favorable to the Petitioner, and is clearly disputed by plaintiff's evidence. The prison doctor's conscious failure to come to the infirmary to examine or treat the critically ill plaintiff, or to transfer him to a competent hospital despite the pleas of the attending Physician's Assistant to do so, and his telephone prescription of a contraindicated drug for purposes of control rather than treatment, constitute a denial of medical care, regardless of whether the plaintiff-decedent had been given treatment in the past.

In 1974 the Seventh Circuit held in Thomas v. Pate, 493 F.2d at 158, that a claim for deliberate indifference to serious medical needs is sufficient under the Eighth Amendment if "the medical care provided is so clearly inadequate as to amount to a refusal to provide essential medical care or so blatantly inappropriate as to evidence intentional mistreatment likely to seriously aggravate the prisoner's condition." The facts here fall squarely under the Thomas definition, rather than under the Court of Apeals and District Court decisions offered by the Petitioner on the issue of level of medical care. Moreover, the cases relied on by Petitioner concern individual prisoner's claims, based on isolated instances, rather than systemic medical problems. If, as the Petitioner argues, such individual cases are to be relied upon in order to determine the status of the right in question here, then the Seventh Circuit's decision in Thomas v. Pate controls. Therefore, the cases cited by the Petitioner do not alter the clearly esta-

blished determination of the Courts below.*

CONCLUSION

As shown above, there is no reason for this Court to review the Court's decision below, as it properly applied the clearly established test, rather than adopting a lower standard; for this reason there is no conflict between the Seventh and D.C. Circuits on this issue. Moreover, the actual determination made by the Court below was fact specific, was amply supported by the undisputed and disputed facts, and by the pertinent Appellate Court decisions.

Further, a grant of certiorari will create additional unnecessary hardship for decedent's heirs, and further delay their day in court. This case is over 14 years old, and has already been heard once by this Court, and three times by the Court of Appeals yet still awaits trial. The estate has no money to contribute to the considerable expense of litigation. Rather than submit to trial, Petitioner has chosen a strategy of delay, which has included the filing of repetitive qualified immunity motions to resurrect his waived interlocutory appeal. Surely civil rights litigants have a basic right to have their complaints heard in an expeditious manner without seemingly interminable procedural delays and serialized appeals by publicly financed private lawyers. This right is equally as important as that of public officials to be protected from non substantial lawsuits, see generally Owen v. City of Independence, 445 U.S. 622, 651 (1988); Smith v. Wade, 461 U.S. 30,

*The Petitioner also asserts it is "truly curious" that the Court of Appeals below found the right to be clearly established when the District Court "twice failed to discern any such obstensibly clear law" and an earlier Seventh Circuit panel had "opined" after a "cursory review of the undisputed facts", and "based solely on those facts, Carlson and Brutsche may be entitled to qualified immunity." (Pet. p.13) (emphasis added) In fact, the District Court found three separate times that the law was clearly established as to Brutsche, on the basis of Thomas v. Pate and Joseph v. Brierton, without considering the law as to systemic deficiencies. As to the Seventh Circuit, on this appeal it had, for the first time, detailed factual findings from the District Court, and it considered those findings, and the entire record, including the disputed facts, in order to make its decision. Moreover, the same judge wrote both decisions, and none of the active judges on the Seventh Circuit voted to rehear the decision.

54-56 (1983); Carey v. Piphus, 435 U.S. 247, 254 (1978).

Accordingly, for all the above reasons, the defendant's Petition should be denied.

Respectfully submitted,

Dated: March 28, 1990

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CERTIFICATE OF SERVICE

I, Michael E. Deutsch, a member of the bar of the Court, hereby certify that I served the following party with the Petition to Proceed in Forma Pauperis and the Brief in Answer to the Petition for Certiorari by placing a copy of same in U.S. Mail, postage prepaid, at 343 S. Dearborn, Chicago, IL on March 28, 1990 before 5 o'clock p.m..

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